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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 1136 81

THE ALTON RAILROAD COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

STATEMENT BY APPELLANT OF BASIS ON WHICH COURT HAS JURISDICTION TO REVIEW DECREE ON APPEAL.

SILAS H. STRAWN,
FRANK H. TOWNER,
Solicitors for Appellant.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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MAY IT PLEASE THE COURT:

In this suit, appellant sought to enjoin, annul, suspend and set aside part of an order of the Interstate Commerce Commission, made on December 7, 1931, in a proceeding before the Commission known as its Docket No. 22487, *William W. Wheelock and William G. Bierd, as Receivers, etc. of The Chicago and Alton Railroad Company* v. *Akron, Canton & Youngstown Railway Company, et al.*, and to enjoin thirty eastern railroads from applying and enforcing against appellant, certain divisions of certain joint through rates, those divisions having been approved by the Commission in the order. The

suit was heard in the District Court by a three-judge court, convened pursuant to the Act of Congress of October 22, 1913 (38 Stat. L. 220, Title 28, U. S. C. A. 47). On April 22, 1932, a final decree was made by the court dismissing the petition of appellant for want of jurisdiction. This appeal is prosecuted from that decree.

(1) The jurisdiction of this court to review said decree on appeal is sustained by the following statutory provisions. The Urgent Deficiencies Act of October 22, 1913 (38 Stat. L. 219-220) confers upon the District Courts of the United States the jurisdiction theretofore vested in the Commerce Court, including jurisdiction over all suits brought to enjoin, suspend, annul, or set aside any order of the Interstate Commerce Commission. The same act provides, with reference to an appeal from the final decree of a District Court in such action, as follows:

> "A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." (38 Stat. L. 220; Title 28, U. S. C. A., Sec. 47.)

By the Act of February 13, 1925, entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for Other Purposes," Section 238 of the Judicial Code was amended to provide:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * *
>
> (4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' ap-

proved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission other than for the payment of money." (43 Stat. L., 938; Judicial Code, Sec. 238; Title 28, U. S. C. A., Sec. 345.)

(2) The decree sought to be reviewed upon this appeal was made and entered on April 22, 1932 (Rec. 164).* The petition for appeal herein (Rec. 169), together with an assignment of errors (Rec. 171) was presented, and the order allowing the appeal was entered, on April 22, 1932 (Rec. 175). The appeal bond was approved and filed on April 22, 1932 (Rec. 177). The citation was issued on April 22, 1932, and after due service, was filed on April 27, 1932 (Rec. 192). The cause was docketed in this court on May 16, 1932.

(3) This suit was instituted by appellant for the purpose of enjoining, annulling, suspending and setting aside an order of the Interstate Commerce Commission, made on December 7, 1931, in a proceeding pending before the Commission and known as its Docket No. 22487, *William W. Wheelock and William G. Bierd, Receivers, etc. of The Chicago and Alton Railroad Company* v. *Akron, Canton & Youngstown Railway Company, et al.*, in so far as said order approved and authorized the application and enforcement of certain divisions of certain joint through rates from Peoria and Pekin, Illinois, to destinations in Eastern Trunk Line territory. Appellant also prayed an injunction against thirty eastern railroads, appellees herein, to restrain them from applying and enforcing against it the divisions approved by the Commission. Appellant is the assignee of the purchasers, at judicial sale, of the railways and property of The Chicago and Alton Railroad Company, and has succeeded to the rights of the receivers of that company.

* All page references are to the pages of the record filed in this court and which has not yet been printed.

The joint through rates involved were published for many years by agreement between the predecessors in interest of appellant, and the carriers operating east of Dwight, Joliet and Chicago, Illinois, and are now published by agreement between appellant and the same eastern carriers. Appellant's service under these rates consists of hauling the traffic from Peoria and/or Pekin to Dwight, Joliet or Chicago. Most of the traffic moving on these rates moves into Peoria or Pekin from points west thereof. If it is reshipped under the joint rates from Peoria or Pekin to the east within twelve months after its delivery at either point, the applicable rates are called "reshipping" or "proportional" rates, and vary in amount, depending upon the territory from which the shipment to Peoria or Pekin was made. If not shipped within twelve months, the applicable rates are called "local" rates. Both kinds of rates are joint rates, and differ only in amount.

Prior to July 1, 1928, the divisions of these rates as between the predecessors of appellant and the eastern lines were presumably satisfactory. On that date, the eastern lines, without the consent of the predecessors of appellant and without any order of any commission or other body having jurisdiction, arbitrarily changed the divisions, reducing the proportions allowed to the predecessors of appellant to nothing in many cases and to a maximum of 2 cents per hundred pounds in all other cases. The predecessors of appellant thereupon filed a complaint with the Commission, naming as defendants all eastern lines which were parties to the joint rates, and alleging that the divisions established by them were unreasonable and otherwise unlawful (Appendix "A" to petition, Rec. 3).

After hearing, Division 5 of the Commission entered an order on November 28, 1930, granting the prayer of

the complaint and requiring the eastern lines to establish certain divisions found by the Commission to be proper (Appendix "B" to petition, Rec. 3). Before this order became effective, the defendants in the proceedings before the Commission petitioned for a rehearing and a postponement of the order. This petition was granted and a rehearing held. Thereafter, on December 7, 1931, the order herein attacked was made by the full Commission, four Commissioners dissenting (Appendix "C" to petition, Rec. 3). In this order the previous order of Division 5, with respect to the divisions of the so-called "local" rates was affirmed. The order of Division 5 with respect to the so-called "reshipping rates" was reversed, and it was held by a majority of the Commission that the assailed divisions of those "reshipping" rates had not been shown to be unjust, unreasonable or otherwise unlawful. The joint "reshipping" rates, however, remained in effect and are still in effect. The result has been that appellant is required to continue the transportation of commodities upon those rates, although it receives nothing on many shipments and on all other shipments amounts which do not pay the cost of operation.

The petition filed in the District Court (Rec. 3) alleged that the order made by the Commission on December 7, 1931, in so far as it approved and authorized the existing divisions of the joint "reshipping" rates, was unreasonable, arbitrary, unlawful and void; that it operated to permit and authorize a confiscation of appellant's property, in violation of its rights under the Fifth Amendment to the Constitution of the United States; that there was no evidence in the record of the proceedings before the Commission which justified the conclusion reached; that in so far as the order approved and authorized the application of those divisions, it should be enjoined, annulled, vacated and set aside, and that

the defendant railroads should be enjoined from applying and enforcing those divisions against appellant.

After a hearing in the District Court, a decree was entered on April 22, 1931 (Rec. 164), dismissing the petition, the holding of the District Court being that the order of the Commission, made on December 7, 1931, in so far as it related to the divisions of the so-called "reshipping" rates, was negative both in form and in substance, and that the court was therefore without jurisdiction to issue the injunction prayed for. The decree of the lower court constituted a final judgment within the meaning of the Act of Congress of October 22, 1913 (38 Stat. L. 220), and pursuant to the provisions thereof, and of the Act of Congress of February 13, 1925 (43 Stat. L. 938), a direct review of this final judgment and decree may be had in this court.

(4) Cases which sustain the jurisdiction of this court to review said decree are as follows:

Virginian Railway Company v. *United States,* 272 U. S. 658.

United States v. *New York Central Railroad Co.* 263 U. S. 603.

Dayton-Goose Creek Ry. Co. v. *United States,* 263 U. S. 456.

Stafford v. *Wallace,* 258 U. S. 495, 512.

Louisville & Nashville Railroad Co. v. *United States,* 238 U. S. 1.

United States v. *The Baltimore & Ohio R. R. Co.* 225 U. S. 306.

Respectfully submitted,

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